STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT

IN THE MATTER OF THE PROTEST OF
PLATINUM PERFORMANCE, LLC, **No. 17-46**
TO ASSESSMENT ISSUED UNDER
LETTER ID NO. L1896246832

DECISION AND ORDER

A formal hearing on the above-referenced protest was held on October 19, 2017 before Hearing Officer Dee Dee Hoxie. The Taxation and Revenue Department (Department) was represented by Ms. Cordelia Friedman, Staff Attorney. Mr. Nicholas Pacheco, Auditor, and Mr. Danny Pogan, Auditor, also appeared on behalf of the Department. Mr. Gabriel Vigil, owner of Platinum Performance, LLC (Taxpayer) appeared for the hearing with his attorney, Mr. Nephi Hardman. Ms. Lori Vigil also appeared with the Taxpayer. The Hearing Officer took notice of all documents in the administrative file. The Department's exhibits #4, #5, #6, #7, #9, #10, and #11 were admitted. The Department's exhibits #2 and #8 were not admitted as evidence, but are included in the administrative file for purposes of the record. The Taxpayer's exhibits "A", "B", "C", and "D" were admitted. A more detailed description of exhibits submitted at the hearing is included on the Administrative Exhibit Coversheet. The Taxpayer objected to several of the Department's exhibits for lack of disclosure and failure to comply with the scheduling order. *See* NMSA 1978, § 7-1B-6 (2015). *See also* 3.1.8.14 NMAC (2001). Exhibits not included on the filed preliminary exhibit list and that were not disclosed by the deadline for the prehearing statement were excluded. Exhibits included on the filed preliminary exhibit list were allowed. Exhibits adopted from the Taxpayer's documents were also allowed as the Taxpayer could not

claim prejudice or lack of knowledge from the use of its own documents. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On September 2, 2016, the Department assessed the Taxpayer as a successor in business. The assessment was for $349,291.48 tax, $180,068.36 penalty, and $63,986.82 interest.
2. On December 5, 2016, the Taxpayer filed a formal protest letter.
3. On February 1, 2017, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.
4. On February 1, 2017, the Hearings Office issued a notice of telephonic scheduling hearing.
5. The telephonic scheduling hearing was conducted on February 20, 2017. The hearing was held within ninety days of the protest.
6. On March 1, 2017, the scheduling order and notice of hearing was issued.
7. On April 21, 2017, both parties filed preliminary exhibit and witness lists.
8. On October 4, 2017, the Taxpayer filed its prehearing statement, including final exhibit and witness lists, as required by the scheduling order when the other party fails to participate in the filing of a joint prehearing statement.
9. On October 12, 2017, the Department emailed and acknowledged that it failed to comply with the scheduling order in regards to the joint prehearing statement.
10. On October 17, 2017, the Department requested that a subpoena be issued.
11. After the hearing commenced on October 19, 2017, the Department filed the return of service on the subpoena.

12. Mr. Vigil was the Vice President of a corporation doing business in Mora, New Mexico from 2007 to 2015 (the corporation).

13. The corporation was registered for the purposes of automotive repair and maintenance, towing, and sales of a specific brand of auto parts.

14. Mr. Vigil was the manager and in charge of all operations of the corporation, but had a silent partner who signed some loan documents.

15. Mr. Vigil delegated the corporation's payroll and taxes to various employees and accountants.

16. On July 1, 2015, the corporation was assessed for gross receipts taxes, compensating taxes, and withholding taxes, including penalty and interest. The corporation's assessment is the basis of the tax, penalty, and interest assessed to the Taxpayer as a successor in business.

17. On July 17, 2015, the Taxpayer was created with Mr. Vigil as its managing member.

18. On August 1, 2015, the Taxpayer entered into a purchase agreement with the corporation for all of its business assets, including furniture, equipment, inventory, and accounts receivable. As part of the purchase agreement, the Taxpayer assumed the liability on two secured liens.

19. The purchase agreement valued the assets sold to the Taxpayer at $435,800.00.

20. The Taxpayer immediately began operating its business doing automotive repair and maintenance, towing, and sales of a specific brand of auto parts.

21. The Taxpayer notified its customers and service providers of its change of name, but continued to operate at the same location, with the same phone number, with most of the same employees.

22. The Taxpayer began focusing on simple maintenance jobs. The Taxpayer stopped taking as many long-term projects that involved time-consuming rebuilds and restorations.

23. The Taxpayer also decreased the amount of towing, and vastly decreased the non-consensual tows that it does.

24. The Taxpayer continued to honor and finish projects that were commenced by the corporation.

25. For several months, the Taxpayer's customers continued to refer to the Taxpayer by the corporation's name. The Taxpayer accepted checks that were made out to the corporation, and deposited them into its account.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable under the assessment as a successor in business to the corporation.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also El Centro Villa Nursing Ctr. v. Taxation and Revenue Department*, 1989-NMCA-070, 108 N.M. 795. Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that it is entitled to an abatement.

Determination of a successor.

A successor in business is "any transferee of a business or *property of a business*, except to the extent it would be materially inconsistent with the rights of secured creditors". 3.1.10.16

(F) (2) NMAC (2001) (emphasis added). "The tangible and intangible property used in any business remains subject to liability for payment of the tax…even though the business changes hands." NMSA 1978, § 7-1-61. "If, after any business is transferred to a successor, any tax…remains due, the successor shall pay the amount due". NMSA 1978, § 7-1-63.

There are several factors to be used in determining a successor in business. *See* 3.1.10.16 (A) NMAC. If a single one of these factors is present, there is a presumption that there is a successor in business. *See* 3.1.10.16 (B) NMAC. Purchasing tangible assets, assuming a lease, keeping one part-time employee, and assuming a note are sufficient to establish one as a successor in business, even when the prior business was defunct. *See Sterling Title Co. of Taos v. Comm'r of Revenue*, 1973-NMCA-086, ¶ 9-11, 85 N.M. 279.

The first factor in determining whether there is a successor in business is whether there was "a sale and purchase of a major part of the materials, supplies, equipment, merchandise or inventory…in a single or limited number of transactions". 3.1.10.16 (A) (1) NMAC. The corporation sold all of its assets to the Taxpayer in a single transaction. This factor weighs in favor of finding that the Taxpayer is a successor in business.

The second factor is whether the transfer was not in the ordinary course of the transferor's business. *See* 3.1.10.16 (A) (2) NMAC. The sale of all of its assets was not in the ordinary course of the corporation's business. This factor weighs in favor of finding that the Taxpayer is a successor in business.

The third factor is whether "a substantial part of both equipment and inventories" was transferred. 3.1.10.16 (A) (3) NMAC. Again, all of the corporation's assets, including equipment and inventory, was transferred to the Taxpayer. This factor weighs in favor of finding that the Taxpayer is a successor in business.

The fourth factor is whether a substantial portion of the business conducted by the transferor continued to be conducted by the transferee. *See* 3.1.10.16 (A) (4) NMAC. The Taxpayer argues that the change in focus from long-term projects to short-term projects and the cessation of non-consensual towing means that the Taxpayer was not conducting a substantial portion of the same business as the corporation. Nevertheless, the Taxpayer and the corporation were both engaged in automotive maintenance and repair, towing, and the sales of a specific brand of auto parts. Therefore, the Taxpayer continued to conduct a substantial portion of the same business as the corporation. This factor weighs in favor of finding that the Taxpayer is a successor in business.

The fifth factor is whether "the transferor's goodwill follow[ed] the transfer of the business properties". 3.1.10.16 (A) (5) NMAC. The Taxpayer has retained many employees who were also working for the corporation. The Taxpayer is using the same location and phone number as the corporation was. The Taxpayer has retained many of the same customers as the corporation, and its customers frequently refer to the Taxpayer by the corporation's name. Consequently, it does appear that the corporation's goodwill was transferred to the Taxpayer. This factor weighs in favor of finding that the Taxpayer was a successor in business.

The sixth factor is whether the business obligations of the transferor were honored by the transferee. *See* 3.1.10.16 (A) (6) NMAC. The Taxpayer admitted that it in at least one instance that it continued to honor an obligation of the corporation. The corporation was doing a long-term project on a particular vehicle, and the Taxpayer finished that project after the transfer. This factor weighs in favor of finding that the Taxpayer is successor in business.

The seventh factor is whether unpaid debts of the transferor were paid by the transferee. *See* 3.1.10.16 (A) (7) NMAC. The Taxpayer assumed liability of two secured liens from the corporation. This factor weighs in favor of finding that the Taxpayer is a successor in business.

The final factor is whether there was an agreement precluding competition. *See* 3.1.10.16 (A) (8) NMAC. There was no such agreement between the Taxpayer and the corporation. This is the only factor that weighs in favor of finding that the Taxpayer is not a successor in business.

The Taxpayer argued that it was operating in a small town, and its choice of locations, employees, and other business factors is extremely limited. The Taxpayer argued that it should not be penalized or presumed as a successor in business merely because of the limitations inherent to providing services in rural areas. The statute indicates that when a business changes hands its tangible and intangible property remain subject to liability for the payment of tax, and the successor may be assessed and liable for the tax of a business that it takes over. *See* NMSA 1978, § 7-1-61. *See also Sterling Title*, 1973-NMCA-086, ¶ 23. The term "business changes hands" is meant to be a broad, all-inclusive expression and is used in the statute for the purpose of maintaining the personalty as security for the payment of tax. *See Sterling Title*, 1973-NMCA-086, ¶ 25. A transfer of any property used in the business, tangible or intangible, is sufficient to show that the business changed hands for purposes of the successor statute. *See* NMSA 1978, § 7-1-61. *See also* 3.1.10.16 NMAC. *See also Sterling Title*, 1973-NMCA-086, ¶ 25. If a single factor is present, there is a presumption that there is a successor in business. *See* 3.1.10.16 (B) NMAC. In this case, numerous factors were present. The Taxpayer acquired all of the corporation's assets and continued providing essentially the same services to the same customers with the same employees at the same location. The Taxpayer failed to overcome the

presumption of correctness and failed to overcome the presumption that it was a successor in business to the corporation.

Limitations on liability.

The Taxpayer argues that if it is a successor in business its liability should be limited to the value of the assets transferred. The Taxpayer argues that the cash value to be paid under the purchase agreement was limited to $30,000 plus the assumption of liens. The Taxpayer argues that it should be able to discharge the successor liability in full by making an offer of payment to the Department under Section 7-1-63. The Department argues that the Taxpayer cannot make an offer of payment after assessment. The Department also argues that the Taxpayer's offer would be rejected in any case because the Taxpayer is a mere continuation of the corporation and the transfer was made to evade the taxes.

"A successor may discharge an assessment made pursuant to this section by paying to the department the full value of the transferred tangible and intangible property." NMSA 1978, § 7-1-63 (C). However, the successor will remain liable for the full amount of the assessment if the transfer was made to evade taxes, or was a mere continuation of the transferor's business, or the successor assumed the liability. *See id.*

The Taxpayer did not agree to assume the corporation's tax liability, and the purchase agreement tries to avoid the assumption of taxes and to avoid the designation as a successor in business. However, the remaining exceptions in the statute, on evading tax and mere continuation, seem to apply to the Taxpayer. A successor in business is a "mere continuation" of the previous business if "the successor maintains the same business with the same employees doing the same jobs under the same supervisors, work conditions and production process and produces the same product for the same customers." 3.1.10.16 (F) NMAC. *See also Garcia v.*

Coe Mfg.Co., 1997-NMSC-013, ¶ 12-14, 123 N.M. 34 (indicating that a common identity of directors and shareholders as well as a substantial continuity in the business done before and after the assets were acquired is a continuation of the original business). *See also Pankey v. Hot Springs Nat'l Bank*, 1941-NMSC-060, ¶ 13, 46 N.M. 10. The Taxpayer maintained the same business of automotive repairs and maintenance, towing, and sales of auto parts that the corporation did. The Taxpayer may have decided to concentrate on maintenance and sales, but the difference in focus did not change the nature of the services provided. The Taxpayer was also in the same location and using most of the same employees. Most significantly, the Taxpayer and the corporation were both owned and run by Mr. Vigil. *See Garcia*, 1997-NMSC-013, ¶ 13 (holding that a key element of continuation is the common identity of officers, directors, and stockholders). Therefore, there was a substantial continuity in the business done by the corporation and the business done by the Taxpayer. Consequently, the Taxpayer's business is a mere continuation of the corporation's business. Moreover, the Taxpayer was created shortly after the assessment to the corporation and the corporation's assets were very shortly thereafter transferred to the Taxpayer. This evidence supports a finding that the transfer was made to evade the tax.

The full value of the assets transferred was $435,800.00. The tax principal assessed was $349,291.48. Therefore, this issue is ultimately moot. Even if the Taxpayer were not a mere continuation and could discharge the assessment by the paying the Department the full value of the assets transferred, it would still be liable for the full $349,291.48 tax principal because the value of the assets exceeds the amount of tax principal due.

Penalty and Interest.

The Taxpayer argued that the assessment of interest and penalty was inappropriate under the *Hi-Country* case. The Department argued that the statute has been amended since the *Hi-Country* case was decided. The Department argued that the new statute should be given retroactive effect. The Department argued that the amendment was made by the legislature in order to clarify a previous ambiguity. A statute is presumed to operate prospectively, but may be applied retroactively if an amendment serves to clarify the law that was in existence at the time if the amendment does not contravene previous constructions of the law. *See Swink v. Fingado*, 1993-NMSC-013, ¶ 35, 115 N.M. 275. An amendment may only serve to clarify the law if the original statute was unclear or ambiguous. *See N.M. Real Estate Comm'n v. Barger*, 2012-NMCA-081, ¶ 18. A clarification does not operate to effect a change; rather it is to clarify what was previously implicit in the law. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶ 25, 149 N.M. 455.

The previous statute was not ambiguous. *See* NMSA 1978, § 7-1-61 (1997). The statute provided a specific definition of "tax" that did not include penalty and interest. *See Hi-Country Buick GMC, Inc. v. Taxation and Revenue Dep't*, 2016-NMCA-027, ¶ 20, *cert. denied*, No. 35,647 (NMSC, March 15, 2016). The decision noted that the legislature could have easily stated in the statute that a successor in business was also liable for penalty and interest, but had more narrowly defined tax in that statute. *See id.* at ¶ 22. The definition of tax in regards to a successor in business now includes penalty and interest. *See* NMSA 1978, § 7-1-61 (2017). Nothing in the amended statute indicates that it should be given a retroactive effect. *See id.* Absent a clear indication otherwise, changes in the law should be given only a prospective effect. *See Swink*, 1993-NMSC-013, ¶ 28. Moreover, the time of the assessment locks in what statute's version of the penalty applies. *See Gea Integrated Cooling Tech. v. State Taxation and Revenue*

Dep't, 2012-NMCA-010. Penalty is added to the amount assessed by the Department, and "assessment is the specific point in time that the statutory penalty is triggered and thereby applied." *Id.* at ¶ 9. The statute was amended in June 2017. *See* NMSA 1978, § 7-1-61 (2017). The Taxpayer was assessed in September 2016. Therefore, the previous version of the statute applied to the Taxpayer's assessment. *See* NMSA 1978, § 7-1-61 (1997). *See also Gea Integrated Cooling Tech.*, 2012-NMCA-010. Accordingly, the assessment of penalty and interest was inappropriate, as the statutory definition of tax did not include penalty and interest at that time. *See Hi-Country*, 2016-NMCA-027.

CONCLUSIONS OF LAW

A. The Taxpayer filed a timely written protest to assessment issued under Letter ID number L1896246832, and jurisdiction lies over the parties and the subject matter of this protest.

B. The Taxpayer is a successor in business to the corporation. *See* NMSA 1978, § 7-1-61 (1997). *See also* 3.1.10.16 NMAC. *See also Sterling Title*, 1973-NMCA-086, ¶ 25.

C. The Taxpayer is a mere continuation of the corporation. *See* NMSA 1978, § 7-1-63. *See also* 3.1.10.16 NMAC. *See also Garcia*, 1997-NMSC-013.

D. Even if the Taxpayer were not a mere continuation, the value of the assets transferred exceeds the amount of tax principal due, so the Taxpayer is liable for the full assessment of tax principal, which was $349,291.48. *See* NMSA 1978, § 7-1-63.

E. Even though the Taxpayer is a successor in business, it is not liable for penalty and interest. *See* NMSA 1978, § 7-1-61 (1997). *See Hi-Country Buick*, 2016-NMCA-027. The assessment for penalty and interest is HEREBY ABATED.

F. The Taxpayer failed to overcome the presumption that the assessment of tax was correct. *See* NMSA 1978, § 7-1-17.

For the foregoing reasons, the Taxpayer's protest **is DENIED IN PART AND GRANTED IN PART**.

DATED: November 3, 2017.

Dee Dee Hoxie

DEE DEE HOXIE
Hearing Officer
Administrative Hearings Office
Post Office Box 6400
Santa Fe, NM 87502

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the parties have the right to appeal this decision by filing a notice of appeal **with the New Mexico Court of Appeals** within 30 days of the date shown above. *See* Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 6400, Santa Fe, New Mexico 87502. Mr. Griego may be contacted at 505-827-0466.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this _____ day of _____, 2017 in the following manner:

First Class Mail ***Interoffice Mail***